Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1992

WALTER SENKOW,

Petitioner,

vs.

ROBERT V. WEISS, STEPHEN R. WERBNER, ROBERT LANNAN, GEORGE A. KANDRA and LORRAINE DUKE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Must a civil rights action under 42 U.S.C. § 1983, seeking money damages from individual police officers and other public officials for alleged constitutional deprivations, be treated as a *Monell* action against the officials' municipal employer in the absence of express language to the contrary in the complaint?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 2

JURISDICTION 2

STATUTORY PROVISION INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES:

Conley v. Gibson, 355 U.S. 41, 48 (1957) 7

Donahue v. Windsor Locks Board of Fire Commissioners, 834 F.2d 54, 57 (2d Cir. 1987)..... 7

Foman v. Davis, 371 U.S. 178, 181-82 (1962)..... 7

Kentucky v. Graham, 473 U.S. 159 (1985)..... 5

Kolar v. County of Sangamon, 756 F.2d 564, 568 (7th Cir. 1985)..... 6

Leatherman v. Tarrant County, No. 91-1657.....3, 7

Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 7

Nix v. Norman, 879 F.2d 429 (8th Cir. 1989)..... 6

Wells v. Brown, 891 F.2d 592 (6th Cir. 1989)..... 6

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Walter Senkow, Petitioner, requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the dismissal of his complaint under 42 U.S.C. § 1983 against certain employees of the Town of Manchester, Connecticut.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit has not been officially reported. It is reproduced in the Appendix to this Petition beginning at App. p. A-1.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on March 9, 1992. A timely petition for rehearing containing a suggestion that the action be reheard in banc was denied on April 27, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1983 of Title 42 of the United States Code provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

This petition presents a set of especially egregious circumstances associated with a recurring problem in the lower courts: the refusal to treat civil rights actions brought under 42 U.S.C. Section 1983 according to the same rules of procedure which apply to all other civil litigation in the United States courts. This persistent problem already has prompted this court to grant certiorari in *Leatherman v. Tarrant County*, No. 91-1657, a case involving the recent judge-made rule that civil rights actions be pled with greater specificity than other civil cases.

This case involves the question whether the individual defendants are being sued in their individual capacities or only in their official capacities. The United States Court of Appeals for the Second Circuit, affirming the District Court for the District of Connecticut, held in effect that a civil rights suit against a public official is presumed to sue that individual only in his official capacity and not in his individual capacity unless the complaint expressly asserts that the official is being sued personally and in an individual capacity. Having made such a finding, without any support whatever anywhere in the record, the District Court then on that basis dismissed the action and was affirmed in an unpublished decision by the Court of Appeals.

The Petitioner Walter Senkow was the Town Engineer for the Town of Manchester, Connecticut, from 1968 to 1986. He was forced to resign from his position after having been accused of sexually harassing a subordinate. Associated with his termination, he was subjected to an

arrest and criminal prosecution in the state court. He pursued his contractual remedies under a collective bargaining agreement with the town and, as a result, eventually entered into a settlement agreement with the town in which, in exchange for a cash payment, he agreed not to continue in his position and released the town from all liability arising out of his employment and the termination thereof.

Almost two years later, the Petitioner filed suit under 42 U.S.C. Section 1983 against the town and several municipal employees, including police officers and others who had been involved in his arrest and criminal prosecution. The suit alleged that the individual defendants were acting under color of law, but specifically did not allege that any individual defendant was being sued in his or her official capacity. A separate count, Count Three, sought relief only against the town and not against any of the individuals. The suit against the individuals sought compensatory damages and other relief. A single attorney appeared for the town and the respondents Weiss, Werbner and Kandra. Separate counsel appeared on behalf of the respondents Lannan and Duke.

All defendants moved to dismiss the complaint upon the basis of the Petitioner's prior release of the town. The Petitioner opposed the motion on the grounds, *inter alia*, that the individual defendants were being sued only individually and not in their official capacities.

The District Court, granting the motion to dismiss of every defendant, held that "it is unclear from the plaintiff's pleadings whether he has sued the individual defendants in their official and/or personal capacities."

Observing that "a Section 1983 cause of action against a governmental officer in his or her official capacity is in reality against the government entity itself," the court then without further discussion treated the suit as one against the defendants in their official capacities only and dismissed. Affirming in an unpublished opinion, the Court of Appeals held that the District Court "properly read the amended complaint as an attempt to state claims against the officials only in their official capacities, which were therefore claims against the town, *see Kentucky v. Graham*, 473 U.S. 159 (1985), and consequently barred by the settlement. Neither in the caption of the amended complaint nor in the substantive paragraphs did Senkow allege a claim against any town employee in his individual capacity."

Petitioner's attempt to amend his complaint to plead individual capacity only was rebuffed by the District Court, the dismissal being with prejudice, and at this point the Petitioner has been denied the right to any litigation against any individual defendant. Only the intervention of this Court for the grant of a writ of certiorari can give this litigant a day in court.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A CIVIL RIGHTS ACTION UNDER 42 U.S.C. SECTION 1983, SEEKING MONEY DAMAGES FROM INDIVIDUAL POLICE OFFICERS AND OTHER PUBLIC OFFICIALS FOR ALLEGED CONSTITUTIONAL DEPRIVATIONS, CAN BE TREATED BY THE LOWER COURTS, SUA SPONTE, AS A *MONELL* ACTION AGAINST ONLY THE OFFICIALS' MUNICIPAL EMPLOYER IN THE ABSENCE OF EXPRESS LANGUAGE TO THE CONTRARY IN THE COMPLAINT.

The decision by the Court of Appeals in this case is the most recent and most egregious in a series of rulings by Courts of Appeals making the bizarre holding that Section 1983 suits against individuals will be treated as suits not against the individuals but, rather, against their governmental employers unless the suits explicitly assert that they are brought against the individuals only as individuals. *See Wells v. Brown*, 891 F.2d 592 (6th Cir. 1989); *Kolar v. County of Sangamon*, 756 F.2d 564, 568 (7th Cir. 1985); *Nix v. Norman*, 879 F.2d 429 (8th Cir. 1989).

The result was especially unreasonable, and especially harsh, in this case because (a) the dismissal was with prejudice and without any right to plead over; and (b) although the complaint did not explicitly assert that the defendants were being sued only as individuals and not in their official capacities, many other factors present in the case demonstrated that the plaintiff and the defendants alike believed that the suit was an individual-capacity suit. For example: the town and the individuals were named and served separately; two of the individual defendants retained counsel separate from the attorney who represented the town; Count Three expressly was

brought only against the town and not against the individuals; the suit expressly alleged in paragraphs 12 and 23 that each defendant acted individually, as well as in concert with the other defendants; the action sought punitive damages, which could not be obtained from the municipality and could be obtained from the individual defendants only if they were sued in their individual capacities rather than in their official capacities. *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). Yet, in the face of all these facts, the court refused even to adhere to the usual rule that ambiguities should be resolved against the moving party. *E.g., Donahue v. Windsor Locks Board of Fire Commissioners*, 834 F.2d 54, 57 (2d Cir. 1987).

Beyond the particular inequity of this case, however, the decision here illustrates with special poignancy a harsh and irrational game which the lower courts are playing in civil rights litigation. Contrary to both the spirit and the letter of modern rules of civil procedure, the lower courts increasingly apply to Section 1983 litigation rules of gamesmanship decisively rejected by all federal courts decades ago. *E.g., Foman v. Davis*, 371 U.S. 178, 181-82 (1962); *Conley v. Gibson*, 355 U.S. 41, 48 (1957).

It is outrageous, and completely inconsistent with long-accepted rules, for an irrational and result-driven policy to be applied in this manner to a particular category of civil cases. Just as *Leatherman v. Tarrant County, supra*, affords this court an opportunity to address the disparity in rules of pleading specificity, this case will afford this court a similar opportunity to address a

closely related disparity in the description and identification of parties to the litigation.

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

No. _____

In The

Supreme Court of the United States

October Term, 1992

WALTER SENKOW,

Petitioner,

vs.

ROBERT V. WEISS, STEPHEN R. WERBNER, ROBERT LANNAN, GEORGE A. KANDRA and LORRAINE DUKE,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TABLE OF CONTENTS

PAGE

Ruling on Petition for Rehearing..... A-1

Opinion of the United States Court of Appeals For the Second Circuit..... A-3

Opinion of the United States District Court For the District of Connecticut..... A-5

Amended Complaint..... A-22

Settlement Agreement..... A-29

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 27th day of April on thousand nine hundred and ninety-two.

WALTER SENKOW,

Plaintiff-Appellant,

V

TOWN OF MANCHESTER; ROBERT B. WEISS; STEPHEN R. WERBNER; ROBERT LANNAN; GEORGE A. KANDRA; LORRAINE DUKE,

Defendants-Appellees.

DOCKET NUMBER: 91-7470(L), 91-9140

(Filed April 27, 1992)

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Plaintiff-Appellant, Walter Senkow.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard

the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine b. Goldsmith
ELAINE B. GOLDSMITH,
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 9th day of March, one thousand nine hundred and ninety-two.

PRESENT: HONORABLE J. EDWARD LUMBARD,
HONORABLE JON O. NEWMAN,
HONORABLE RALPH K. WINTER,
Circuit Judges.

WALTER SENKOW,

Plaintiff-Appellant,

v.

91-7470
91-9140

TOWN OF MANCHESTER,
ROBERT B. WEISS, STEPHEN R.
WERBNER, ROBERT LANNAN,
GEORGE A. KANDRA, and
LORRAINE DUKE,

Defendants-Appellees.

ORDER

(Filed March 9, 1992)

Appeal from the United States District Court for the District of Connecticut (Alan H. Nevas, Judge).

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED and the supplemental judgment is AFFIRMED AS MODIFIED.

Walter Senkow appeals from the judgment and supplemental judgment that dismissed his complaint under 42 U.S.C. § 1983 against the Town of Manchester, Connecticut, and certain town employees and awarded the defendants their attorney's fees under 42 U.S.C. § 1988. Senkow was discharged from his position as town engineer for harassing a female co-worker by placing sexually explicit photographs on her desk. Senkow initially challenged his discharge through a union grievance. Ultimately a settlement was reached whereby Senkow's termination was revoked, he was permitted to resign, he received nearly $20,000 in accrued salary and benefits, and he released the Town from liability for all claims arising out of Senkow's employment or resignation from the Town.

Seventeen months after the settlement was reached, Senkow filed the instant suit against the Town and various Town officials. On motion for summary judgment, the District Court dismissed the suit, ruling that the settlement agreement barred the suit. Senkow purported to challenge the validity of the settlement, claiming it was the product of duress. He produced no evidence to support that claim. Moreover, even if we assume, as Senkow

contends, that the validity of the settlement as a bar to the suit is a matter of federal law, and further assume that Senkow was not required to tender the money paid to him in order to challenge the release, *see Hogue v. Southern R. Co.*, 390 U.S. 516 (1968), the District Court was entirely correct to rule that Senkow had ratified the settlement under all the circumstances, notably the long delay in questioning the settlement in any way. There was no genuine issue of material fact as to whether the settlement had been ratified.

Senkow further claims that the settlement barred only his claims against the Town leaving him free to sue the Town officially in their individual capacities. The District Court properly read the amended complaint as an attempt to state claims against the officials only in their official capacities, which were therefore claims against the Town, *see Kentucky v. Graham*, 473 U.S. 159 (1985), and consequently barred by the settlement. Neither in the caption of the amended complaint nor in the substantive paragraphs did Senkow allege a claim against any Town employee in his individual capacity.

With respect to the award of defendants' attorney's fees, we agree with the District Court that the suit against the Town, filed seventeen months after the settlement, was so plainly frivolous as to warrant an award of the town's fees under 42 U.S.C. § 1988. However, though we affirm the District Court's ruling that the suit made claims against the town officials only in their official capacities and that these claims were barred by the settlement, the barrier of the settlement to the claims against the officials was not so obvious as to render these claims frivolous. Accordingly, we modify the fee award to allow

only the fee of $2,720 submitted by counsel for the Town, and disallow the fee of $10,532 submitted by Howard, Kohn, Sprague & Fitzgerald. As modified, the judgment of the District Court is affirmed.

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

/s/ J. Edward Lumbard

/s/ Jon O. Newman

/s/ Ralph K. Winter
Circuit Judges.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

WALTER SENKOW	:	Civil No.
	:	H-88-41(AHN)
v.	:	
TOWN OF MANCHESTER,	:	
ROBERT WEISS,	:	
STEPHEN WERBNER,	:	
ROBERT LANNAN,	:	
GEORGE KANDRA,	:	
AND LORRAINE DUKE	:	

RULING ON PENDING MOTIONS

Walter Senkow, the plaintiff in this employment dispute grounded on both federal and state law, was the town engineer for the defendant Town of Manchester (the "Town" or "Manchester"), Connecticut from 1968 to 1986. He alleges he was illegally forced to resign from his job. In addition to the Town, Senkow has sued Manchester's general manager, assistant manager, director of public works, chief of police, and a detective in the police department. The parties' cross-motions for summary judgment are pending before the court.[1] For the following reasons, the court grants the defendants' motions and denies the plaintiff's motion.

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[1] Also pending are the defendants' motions for judgment and their motion to strike exhibits. The former seek judgment because the plaintiff's opposition to the defendants' motions for summary judgment was late filed under the then extant scheduling order. The defendants also object to the late filing of the plaintiff's cross-motion for summary judgment. Though

(Continued on following page)

I.

A.

The following narrative is based, except where indicated, on the undisputed facts in this case: On December 22, 1985 the plaintiff, after close of business, left pictures of a pornographic nature on the desk of a fellow employee, a woman employed in the Town's planning office. The pictures depicted a heterosexual couple engaged in sexual intercourse. Five days later the plaintiff repeated this activity, again leaving pornographic pictures after hours on the same female co-worker's desk. The woman purportedly became very upset and feared for her safety. On April 28, 1986 the plaintiff surreptitiously left a book – "Looking for Mr. Goodbar" by Judith Rossner – on the same employee's desk.

At some unspecified time, the recipient of these materials reported the incidents to the Manchester police department. Defendant Detective Lorraine Duke conducted an investigation into the matter. During the course of her inquiry, Senkow confessed to leaving the

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(Continued from previous page)

the plaintiff's submissions were not in technical compliance with the court's order, the court in its discretion permits them and denies the motion for judgment. Because the court rules in favor of the defendants on their Rule 56, Fed. R. Civ. P., motions, no prejudice inures to the defendants by the court's indulgence of the plaintiff's tardiness. For the same reason, the court denies the defendants' motion to strike exhibits 15 and 16 of the plaintiff's opposition to the defendants' summary judgment motions.

materials on the employee's desk and signed a sworn statement to that effect. In his deposition, the plaintiff testified that he meant no harm to the woman and thought she would find the materials "interesting and humorous."

Defendant Robert Weiss, the town's general manager, learned of the plaintiff's confession and summoned Senkow to his office. At a meeting with the plaintiff on May 13, 1986, Weiss told Senkow that he would either have to resign or be fired for sexually harassing the female employee. Also present at this meeting was defendant Robert Lannan, the Manchester chief of police. The plaintiff requested five hours to consider the ultimatum. At 3:30 p.m. that same day, Senkow again met with Weiss and told the general manager that he would not resign. Defendant George Kandra, the Town's director of public works, also attended this meeting. Weiss then ended Senkow's employment with the Town by handing the plaintiff a letter of termination.

The plaintiff consulted with his union representatives, who filed a grievance with Manchester officials on Senkow's behalf. After a series of meetings, the plaintiff, the union representatives, and Town officials entered into a settlement agreement on July 31, 1986. The agreement revoked the plaintiff's termination, permitted him to resign his position with the Town, and provided him with, among other things, accrued back pay, sick time, and vacation time. The settlement agreement also contained a release provision immunizing the Town from liability for any conduct arising out of the plaintiff's municipal employment. Senkow and his attorney both signed the agreement. Shortly thereafter the plaintiff

received the monetary sums promised under the agreement.

On January 20, 1988 – some 17 months after the settlement agreement was executed – the plaintiff brought suit in this forum.

B.

In his amended complaint the plaintiff alleges that he was constructively discharged by the defendants, not for distributing the sexual matter to the female employee, but for speaking in the past "to the press about matters of public interest and for insisting that commercial developers in the Town . . . strictly follow prudent engineering practices." Amended Complaint, para. 11. Senkow also alleges that his transmittal of the materials in question was constitutionally protected and that he was deprived of procedural due process throughout his termination, revoked termination, and eventual resignation. According to the plaintiff, defendant Duke prepared a false application for an arrest warrant against him. He also accuses the defendants of leaking false accusations to the press.

In pursuing monetary relief – including punitive damages – and reinstatement, the plaintiff has fashioned a three-count complaint. In count one Senkow alleges that the defendants have deprived him, pursuant to 42 U.S.C. Section 1983, of his right to privacy, and of his freedoms of expression, association, to be secure in his person, and to be secure from malicious prosecution. Count two is a section 1983 claim for deprivation of a property right without due process. The third count is directed at the

Town only and charges it with discrimination against the plaintiff in his employment in violation of Conn. Gen. Stat. Section 31-51q. The defendants have counterclaimed alleging breach of the settlement agreement.

In their Rule 56, Fed. R. Civ. P. motions, the defendants raise a host of challenges to the plaintiff's claims. Chief among them is that this suit is precluded by the provisions of the settlement agreement. In the same vein, the defendants contend that the plaintiff's actions after execution of the agreement demonstrate both ratification of the agreement and accord and satisfaction. The defendants also argue that the plaintiff's federal and state claims must fall for failure to state claims upon which relief can be granted. In his cross-motion Senkow moves for summary judgment against defendant Weiss on count two of the amended complaint. The plaintiff also moves for summary judgment on the defendants' counterclaim.

II.

Because the issues bearing on the preclusiveness of the settlement agreement are potentially dispositive of the entire case, they deserve initial scrutiny. The agreement was entered into by the plaintiff, the Town, and the Civil Service Employees Affiliates, Inc. ("CSEA"), the plaintiff's union. The three parties agreed that the May 13, 1986 termination letter would be rescinded and the plaintiff returned to good standing. The document also provided that Senkow would resign effective July 25, 1986 and be paid some $19,988 in retroactive salary and liquidated fringe benefits. The plaintiff remained eligible to receive payments under the Town's pension plan. The

CSEA agreed to withdraw cases then pending before the State Board of Mediation and Arbitration and the State Board of Labor Relations; the Town agreed to withdraw its request for a temporary injunction, as to the mediation and arbitration case, then pending in state court.

The last paragraph of the agreement reads as follows:

> In exchange for the promises made in this Agreement, each party hereto hereby releases and forever discharges the other from any and all claims, demands, obligations, losses, causes of action, [and] liabilities of any nature whatsoever that may presently exist or may exist in the future in favor of one against the other, arising out of Walter Senkow's employment and/or resignation from the Town.

Memorandum of Law in Support of Motion for Summary Judgment of Defendants Town of Manchester, Robert Weiss, George A. Kandra, and Steven R. Werbner, Exhibit 3 (Excerpts from Deposition of Walter Senkow) (Settlement Agreement appended thereto) ("Settlement Agreement"). Defendant Weiss signed the agreement on behalf of the Town, Joseph Carosella on behalf of the CSEA, and the plaintiff on behalf of himself. One of the witnessing signatures on the July 31, 1986 document is that of John LaBelle, the plaintiff's attorney.

The defendants press the argument that the provisions of the settlement agreement operate as a complete bar to the instant suit. The plaintiff admitted at his deposition that he had met with Attorney LaBelle after the agreement was drafted. Senkow also admitted that it was his signature on the document and that he had received

the sum promised him. Notwithstanding these admissions, the plaintiff challenges the legal effect of the agreement in several respects. He argues that the agreement was signed under duress because he had no real input into the terms of the contract and only 24 hours to review its contents. he also argues that the agreement does not prohibit suit in this forum, only continuation of his union-sponsored litigation in the state system. Last, he contends that even if the agreement bars federal suit, the preclusion applies to the Town only and not to the individual defendants.

A.

Even assuming for the sake of argument that the plaintiff's duress challenge to the preclusive effect of the settlement agreement has merit, the court finds that Senkow's conduct in the interval between the date the agreement was executed and the date he brought suit in this forum constitutes ratification of the agreement.

> '[A] contract entered into as the result of duress is not void, but merely voidable, and is capable of being ratified after the duress is removed. Ratification results if the party who executed the contract under duress accepts the benefits flowing from it or remains silent or acquiesces in the contract for any considerable length of time after opportunity is afforded to annul or void it.'

DiMartino v. City of Hartford, 636 F. Supp. 1241, 1252 (D. Conn. 1986) (Blumenfeld, JJ.) (quoting *Gallon v. Lloyd-Thomas Co.*, 264 F.2d 821, 826 (8th Cir. 1959)). *See also Restatement of the Law of Contracts* Sections 484 & 499; 13 *Williston on Contracts 3d* Section 1624 at 772-76 (1970).

In *DiMartino* the plaintiff, a former police officer for the defendant municipality, brought an age discrimination suit against the city. During the course of the suit, the parties entered into a settlement agreement whereby the defendant agreed to allow the plaintiff to be retested for a policy officer position. As part of the retesting process, the plaintiff agreed to submit to a medical examination. 636 F. Supp. at 1243-44 n.2. The agreement also contained other provisions requiring concessions from both the plaintiff and the city. The agreement was signed on November 6, 1984; some two months later – on January 8, 1985 – the plaintiff learned that he had failed the medical examination and would not be reinstated. *Id.* at 1252. The court concluded that the plaintiff had done nothing to avoid the agreement until he received the adverse news about his medical tests:

> By then the City of Hartford had performed all its obligations under the terms of the settlement. During the intervening period DiMartino had ample opportunity to ask his lawyers to contest the settlement, but instead chose to take his chances in the hope that the settlement would work to his favor. Under general principles of contract such behavior amounts to a ratification as a matter of law.

Id. (citing *Gallon*, 264 F.2d 826).

To prevail on a motion for summary judgment, the movant must show "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a mater of law." Rule 56(c), Fed. R. Civ. P. The movant may satisfy this burden by demonstrating that the record is devoid of anything to support the non-

moving party's case; if the movant meets this burden, it becomes necessary for the non-moving party to offer some evidence demonstrating the existence of a prima facie case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). All reasonable doubts in the record must be drawn against the moving party, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970), but because a case must be evaluated by whether the record presents a jury issue, the case must be assessed in light of the "actual quantum and quality of proof necessary to support liability. . . . " *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). In short, summary judgment is an appropriate vehicle for truncating fundamentally deficient cases before trial: "Summary judgment . . . is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Celotex*, 477 U.S. at 327 (quoting Rule 1, Fed. R. Civ. P.).

During the intervening year and five months between signing the settlement agreement and initiating suit, the plaintiff took no action that would demonstrate an intent to challenge the agreement. by his own deposition testimony, Senkow accepted and retained the money authorized in the agreement. He never attempted to return the settlement proceeds – paid to him in August 1986 – as a repudiation of the agreement. Except for what the plaintiff perceived to be two breaches of the agreement, Senkow admitted that the Town had fulfilled all of its obligations under the contract.

The first purported breach involved the requirement under the agreement that the plaintiff be restored to good

standing. The following exchange took place at the plaintiff's deposition:

Defendants' Attorney ("Atty"): Did the Town abide by [the] agreement, Mr. Senkow?

Senkow: No.

Atty: In what way did they not?

Senkow: They never restored me the good standing.

Atty: In your mind, what does that mean, restore you to good standing?

Senkow: I should have been eligible to apply for the Town engineering job.

Atty: Did there ever come a time when you applied for the Town engineer's job?

Senkow: I tried to. I was told that I would not get it.

Atty: Well, did you ever apply for the town engineer's job since you left the Town's employment in May of 1986?

Senkow: They told me not to bother.

. . . .

Atty: When?

Senkow: I tried to apply in April of '87.

Atty: You submitted an application?

Senkow: No, I did not submit it.

Atty: Why didn't you submit it?

Senkow: I talked to Mr. Weiss and Mr. Kandra, and they told me not to even bother.

Plaintiff's Cross-Motion for Summary Judgment, Exh. 8 (Deposition of Walter Senkow) at 226-27.

The second alleged instance of breach concerns a purported promise by the Town not to release information regarding the sexual harassment incidents unless authorized by the plaintiff. According to the plaintiff, the Town provided unauthorized information to the Connecticut Department of Transportation, where he had obtained employment in September 1986 – some two months after execution of the settlement agreement. *Id.*, Senkow Deposition at 235-38, 278.

The plaintiff's memorandum in opposition to the defendants' motion and in support of his cross-motion is conspicuously circumspect about the ratification issue. Even according the plaintiff the recognition that the defendants breached the "good standing" provision of the agreement when they discouraged him from applying in April 1987 for his former job, he waited another eight months before filing suit. There is also nothing in the record to indicate that Senkow took less formal steps to vent his displeasure with the purported inequities of the agreement or that he lacked opportunities to do so. In fact, the evidence is to the contrary:

Defendants'
Atty: Had you ever complained to anyone associated with the Town of Manchester, any Town employees . . . about the Town's failure, in your view, to abide by the settlement agreement?

Senkow: No, I don't remember. No, I don't think so. I don't –

Atty: Had you ever complained to any Town officials, Town employees or elected officials of the Town of Manchester that you didn't think the settlement agreement was fair and reasonable?

Senkow: I never discussed the settlement agreement with anybody.

Atty: So you never complained to them that it was unfair or unreasonable?

Senkow: No.

Atty: . . . The first time you . . . made any contention regarding the validity of the settlement agreement was when this lawsuit was brought, is that true, to the best of your knowledge. . . . Public or private to anybody?

Senkow: Officially, yes.

Id., Senkow Deposition at 239-40. Despite the ambiguity present in some of the plaintiff's responses, it seems clear that he did not challenge the agreement in any meaningful way until he filed this suit in January 1988.

As to the second alleged breach, the court admits that it is at a loss to consider fully the circumstances surrounding the purported unauthorized release of information by the defendants. The two-page settlement agreement that is before the court makes no mention of an authorization requirement. Rather, that proscription apparently arises from a phantasmagorical "third page" that has not been produced by either side in this litigation. *See id.*, Senkow Deposition at 222-25. During the plaintiff's deposition, he produced and identified a July

30, 1986 letter from defendant Stephen Werbner, Manchester's assistant manager, to Joseph Carosella as a third page of the agreement. At oral argument on the cross-motions, the court asked plaintiff's counsel why he had not supplied the additional page for the court's review. Counsel's enigmatic response was that he had the letter but did not to provide it because "it would have helped" the defendants. He also stated that it was not his burden to produce the absent document. Somewhat disingenuously, however, the plaintiff raises the existence or non-existence of the third page as a genuine issue of material fact.

It is clear that "[a] contract or release, the execution of which is induced by duress, is voidable, not void, and the person claiming duress must act promptly to repudiate the contract or release or he will be deemed to have waived his right to do so." *DiRose v. PK Management Corp.*, 691 F.2d 628, 633-34 (2d Cir. 1982) (applying New York law), *cert. denied*, 461 U.S. 915 (1983). The record is devoid of indicia supporting a conclusion that the plaintiff acted expeditiously to challenge the settlement agreement. Even granting Senkow every beneficial inference from the evidence he cites, including his reliance on the missing "third page," the court still must conclude that Senkow "acquiesce[d] in the contract for a [] considerable length of time after opportunity [was] afforded to annul or void it." *DiMartino*, 636 F. Supp. at 1252 (quoting *Gallon*, 264 F.2d at 826). In short, viewing the record in a light most favorable to the plaintiff, the record does not support a finding that there is a material issue of disputed fact as to the validity of the settlement agreement

B.

Having concluded that the plaintiff ratified the terms of the settlement agreement by failing to challenge the document in a timely manner, the court is now faced with the task of determining whether the agreement bars this suit. According to the defendants, the preclusive effect of the release paragraph of the agreement extends to federal litigation. The plaintiff views the agreement less expansively. He argues that the agreement was specific to the then pending state labor proceedings.

The law is clear that contract principles apply to the interpretation of releases. *Bartel Dental Books Co., Inc. v. Schultz*, 786 F.2d 486, 488 (2d Cir.) (citing *Bank of Am. v. Gillaizeau*, 766 F.2d 709, 715 (2d Cir. 1985)), *cert. denied*, 478 U.S. 1006 (1986). Moreover, in construing the scope of a release, a court must give effect to the intent of the parties. *Ruskay v. Waddell*, 552 F.2d 392, 395 (2d Cir.) (citing *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 342-48 (1971)), *cert. denied*, 434 U.S. 911 (1977). In gauging that intent, the court considers the express language of the release and the circumstances surrounding its execution. *Ruskay*, 552 F.2d at 395-96.

The release provision at issue bears repeating:

> In exchange for the promises made in this Agreement, each party hereto hereby releases and *forever* discharges the other from *any* and *all claims*, demands, obligations, losses, *causes of action*, [and] liabilities *of any nature whatsoever* that may *presently exist* or *may exist in the future* in favor of one against the other, *arising out* of

> Walter Senkow's *employment* and/or *resignation* from the Town.

Settlement Agreement (emphases added). The express language of this general release is certainly broad enough to encompass the pending litigation. Clearly, the plaintiff abandoned future "causes of action . . . of any nature whatsoever . . . arising out of" his employment relationship with the Town. *Id.* It is difficult to conceive how the language could be made more unambiguous. Notwithstanding the plaintiff's contention that the words "convenant not to sue in federal court" were a necessity, the provisions of the release plainly and unequivocally express a mutual intent to effect a relinquishment of all claims in connection with the plaintiff's employment.

The court perceives no inequity in enforcing this private resolution of the parties' dispute. Nothing in the record hints of fraud, mistake, or unconscionability. The plaintiff admitted execution of the settlement agreement, and the court presumes he read and understood the document either before or after consulting with counsel. Moreover, the plaintiff accepted and retained the benefits set forth in the terms of the agreement. If ancillary challenges to the agreement once existed – the plaintiff's duress challenge, for example – they dissipated during the 17 months the plaintiff allowed the agreement to lie undisturbed.

One other matter bears mention. As a fallback position, the plaintiff argues that even if the settlement agreement prohibits federal suit against the Town, it does not preclude such suit against the individual defendants. In its preamble, the settlement agreement states that it "is

entered into by and between the Town of Manchester . . . , [CSEA], and Walter Senkow." *Id.* According to the plaintiff, a material issue of disputed fact remains as to whether the agreement was intended to shelter the town officials within its scope. The court agrees with the defendants that the agreement also bars this action against the individual defendants. At issue in the state labor proceedings that spawned the settlement agreement were the acts of omissions of some or all of the defendants in the instant suit. It would seem incongruous if the Town did not intend to immunize its officials when it agreed to a comprehensive resolution of the Senkow matter. Furthermore, it is unclear from the plaintiff's pleadings whether he has sued the individual defendants in their official and/or personal capacities. Certainly, the equitable relief he seeks – reinstatement – could be effectuated only if he were to prevail against these defendants in their official capacities. It is beyond argument that a section 1983 cause of action against a governmental officer in his or her official capacity is in reality against the government entity itself: "Official-capacity suits . . . 'generally represent only another way of pleading an action against an entity of which an officer is an agent.' " *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (quoting *Monell v. New York City Dept. of Social Serv.*, 436 U.S. 658, 690 n.55 (1978)). The court sees no impediment to including the individual defendants within the protective scope of the settlement agreement.[2]

---

[2] Because the court concludes that the settlement agreement is an insurmountable barrier to continued maintenance of this suit, the court refrains from addressing the parties' other arguments.

Conclusion

For the foregoing reasons, the court grants the defendants' motions for summary judgment and denies the plaintiff's cross-motion. In addition the court disposes of the remaining motions as noted *supra* in footnote 1. The Clerk of the Court is directed to enter summary judgment, pursuant to Rule 56, Fed. R. Civ. P., in favor of the defendants.

SO ORDERED this 8th day of August, 1989 at Hartford, Connecticut.

/s/ Alan H. Nevas
Alan H. Nevas
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

WALTER SENKOW, Plaintiff	H-88-41 (AHN)
vs.	MARCH 17, 1988
TOWN OF MANCHESTER, et. al., Defendants	

AMENDED COMPLAINT

FIRST COUNT

1. Jurisdiction is conferred on this court by 28 U.S.C. 1331, 1343(3), and (4).

2. The plaintiff, Walter Senkow, was Town Engineer for the Town of Manchester, Connecticut, for approximately eighteen (18) years, from 1968 until 1986. He is a resident of Manchester.

3. The defendant, Town of Manchester, is a municipality operating under color of Connecticut law. At all relevant times, the individual defendants operated as agents of the Town.

4. The defendant, Robert B. Weiss, was, at all relevant times, General Manager of the Town of Manchester.

5. The defendant, Stephen R. Werbner, was, at all relevant times, Assistant Manager of the Town of Manchester.

6. The defendant, Robert Lannan, was, at all relevant times, Chief of Police of the Town of Manchester.

7. The defendant, George A. Kandra, was, at all relevant times, Director of Public Works of the Town of Manchester.

8. The defendant, Lorraine Duke was, at all relevant times, a detective in the Police Department of the Town of Manchester.

9. The acts alleged herein were committed by the defendants under color of state law.

10. At all relevant times, the plaintiff's employment was a permanent position, and he had a property interest in his position.

11. Prior to May 13, 1986, the plaintiff had been criticized and reprimanded by defendants Weiss, Werbner, Kandra and the Town of Manchester for speaking to the press about matters of public interest and for insisting that commercial developers in the Town of Manchester strictly follow prudent engineering practices.

12. On the morning of May 13, 1986, defendants Weiss, Werbner, Lannan, Kandra, and the Town of Manchester, acting individually and in concert, ordered the plaintiff to resign from his position as Town Engineer under the pretext that he had given several items of printed material to a co-worker. They told the plaintiff that if he did not resign, he would be fired, arrested, and held up to ridicule in the press.

13. The plaintiff's right to transmit the material was protected by the United States and the Connecticut Constitutions.

14. The plaintiff refused to resign his position because he had done nothing wrong and had not violated any rules.

15. The plaintiff was then discharged from his employment, and defendants Weiss, Kandra, Werbner, and the Town of Manchester issued a false written accusation that the plaintiff had harassed a female employee.

16. No hearing was made available at any time.

17. On May 14, 1986, and thereafter, the defendants publicly accused the plaintiff of sexual harassment and caused this false accusation to be widely published in several newspapers.

18. On May 16, 1986, defendant Duke prepared an application for an arrest warrant, supported by her sworn affidavit, in which she falsely accused the plaintiff of disorderly conduct and falsely stated there was probable cause for the plaintiff's arrest.

19. On or about May 17, 1986, the defendants conveyed to the press the substance of Duke's accusations and caused the accusations to be published in several newspapers.

20. The defendants caused the plaintiff to be issued an infraction, and the plaintiff was forced to pay $136.00.

21. The actions of the defendants subjected the plaintiff to overwhelming stress, embarrassment and loss of reputation. On July 31, 1986, the defendants forced him to resign from his position as Town Engineer. His resignation was a constructive discharge.

22. The plaintiff has suffered great financial loss and emotional stress and stigmatization. As a direct result of the defendants' actions, the plaintiff has not been able to find comparable employment, he has been refused consideration for re-hire, and his marriage has dissolved.

23. In carrying out the actions described above, the defendants colluded and conspired with one another, intentionally and maliciously, for the purpose of forcing the plaintiff out of his position as Town Engineer. Their accusations against the plaintiff were pretextual.

24. The defendants' actions deprived the plaintiff of his right to privacy and of his freedom of expression, freedom of association, freedom to be secure in his person and to be secure from malicious prosecution, in violation of the United States Constitution, the Connecticut Constitution and 42 U.S.C. 1983.

SECOND COUNT

1-23. Paragraphs 1-23 of the First Count are incorporated herein by reference.

24. The defendants' actions deprived the plaintiff of property without due process, in violation of the United States Constitution and 42 U.S.C. 1983.

THIRD COUNT

1. Jurisdiction for this Third Count is conferred on this court by pendent state jurisdiction.

2-24. Paragraphs 2-24 of the First Count are incorporated herein by reference.

25. The Town of Manchester discriminated against the plaintiff in his employment in violation of Conn. Gen. Stat. 31-51q.

WHEREFORE, the plaintiff claims:

1. Compensatory damages, including damages for emotional distress.

2. Back pay.

3. Punitive damages, including punitive damages permitted by Conn. Gen. Stat. 31-51q.

4. Reinstatement to his employment with comparable responsibilities and salary.

5. Counsel fees and costs.

6. Such other relief as the court may deem just and equitable.

The plaintiff claims a trial by jury on all legal matters.

THE PLAINTIFF,

by, /s/ Leon M. Rosenblatt

Leon M. Rosenblatt
10 North Main St.
West Hartford, Ct. 06107
(203) 523-8066
Juris No. 302831

SETTLEMENT AGREEMENT

This settlement agreement (hereinafter referred to as "Agreement"), dated July 31, 1986, is entered into by and between the Town of Manchester (hereinafter referred to as "Town"), Civil Service Employees Affiliates, Inc. (hereinafter referred to as "CSEA"), and Walter Senkow.

In consideration of the following terms and conditions, the Town, CSEA and Walter Senkow agree as follows:

1. The termination letter, dated May 13, 1986, addressed to Walter Senkow from General Manager Robert B. Weiss and Public Works Director George A. Kandra shall be rescinded, and he is hereby restored to good standing.

2. The employment relationship between the Town and Walter Senkow will end effective July 25, 1986. Walter Senkow shall submit his resignation in writing, dated July 25, 1986. Said resignation shall be addressed to Mr. George Kandra, Public Works Director of the Town, and Robert B. Weiss, General Manager of the Town.

3. Walter Senkow shall be paid the following amounts:

   a. Retroactive salary from the period of May 14, 1986, to July 25, 1986, in the amount of Seven Thousand Eight Hundred Sixty-eight and 07/100 Dollars ($7,868.07), less deduction for taxes and pension contribution.

   b. Payment for Forty-five (45) days of unused, accumulated sick time and

233 1/3 hours of unused, accumulated vacation time in the amount of Twelve Thousand One Hundred Twenty and 49/100 Dollars ($12,120.49), less deductions for taxes.

c. Said payments referenced shall be made to Walter Senkow on August 15, 1986, and shall constitute full and final payment from the Town.

4. Walter Senkow agrees that he shall not apply for or receive unemployment compensation for which he might otherwise be eligible during the period of time between his resignation and his securing of other employment. Walter Senkow shall report to the Unemployment Compensation Office of the State of Connecticut his retroactive salary during the period from May 14, 1986 to July 25, 1986, and if required reimburse the State of Connecticut for unemployment compensation payments made during said period of time.

5. Walter Senkow shall be eligible to leave his pension contributions in the Town of Manchester Pension Plan and be considered a vested terminated employee eligible to receive pension payments in accordance with Section 13-42(g) of the Town of Manchester Supplemental Pension Plan.

6. Walter Senkow shall be eligible to purchase the Town of Manchester insurance package for himself and family for a period of thirty-nine (39) weeks from the date of July 25, 1986. Such payments must be made in the amount and manner as determined by the Town of Manchester Finance Department.

7. CSEA shall withdraw form the State Board of Mediation and Arbitration Case No. 8586-A-976 and consider the case closed.

8. CSEA shall withdraw from the State Board of Labor Relations Case Nos. MPP-9978 and MPP-9997 and consider said cases closed.

9. The Town shall not contest the notice of potential liability to the Town for unemployment compensation for Walter Senkow.

10. The Town shall withdraw its request for a temporary injunction with the Superior Court in Hartford related to CSEA filing with the State Board of Mediation and Arbitration Case No. 8586-A-976.

In exchange for the promises made in this Agreement, each party hereto hereby releases and forever discharges the other from any and all claims, demands, obligations, losses, causes of actions, liabilities of any nature whatsoever that may presently exist or may exist in the future in favor of one against the other, arising out of Walter Senkow's employment and/or resignation from the Town.

In witness whereof, the parties have executed this Agreement as of the day and year written above.

TOWN

/s/ Phyllis C. Derrick
Witness

/s/ Robert B. Weiss
Robert B. Weiss
General Manager

CSEA

/s/ Illegible
Witness

/s/ Joseph Carosella
Joseph Carosella
Director of
Field Service

/s/ John D. LaBelle
Witness

/s/ Walter Senkow
Mr. Walter Senkow

Supreme Court, U.S.
FILED
AUG 17 1992
OFFICE OF THE CLERK

No. 92-125

In The

Supreme Court Of The United States

OCTOBER TERM, 1992

WALTER SENKOW,
Petitioner

v.

ROBERT B. WEISS, STEPHEN R. WERBNER, ROBERT LANNAN, GEORGE A. KANDRA and LORRAINE DUKE,
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED

May a civil rights action under 42 U.S.C. § 1983, seeking money damages and equitable relief jointly from a Town and Town officials, be pursued against the officials in their individual capacities where the Complaint expressly alleges only an official-capacity action and where the lawsuit has been determined to be barred by a valid Settlement Agreement accruing to the benefit of the Town and its officials in their official capacities.

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT	1
STATUTORY PROVISIONS INVOLVED	2
PRELIMINARY STATEMENT	3
STATEMENT OF CASE	4
ARGUMENT	9
I. PLAINTIFF FAILS TO SET FORTH AN APPROPRIATE BASIS SUPPORTING HIS PETITION THAT THIS COURT SHOULD CONSIDER REVIEWING THE MATTER	9
II. NO BASIS EXISTS TO DISTURB THE DETERMINATION THAT THE PLAINTIFF SUED THE DEFENDANTS IN THEIR OFFICIAL CAPACITIES	13
A. EVEN UNDER LESS RIGID PLEADING REQUIREMENTS, THE PLAINTIFF DID NOT ALLEGE CLAIMS AGAINST THE DEFENDANTS IN THEIR PERSONAL CAPACITIES	13

Page

B. THERE IS NO ISSUE PENDING AS TO THE APPROPRIATENESS OF THE DISTRICT COURT'S DENIAL OF THE MOTION FOR LEAVE TO AMEND 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Hafer v. Melo, 502 U.S. ____,
116 L.Ed.2d 301, 308 n.*,
112 S.Ct. 358, 361 n.* (1991) 14, 15

Houston v. Reich, 932 F.2d 883,
(10th Cir. 1991) 15

Kentucky v. Graham, 473 U.S. 159,
87 L.Ed.2d 114, 105 S.Ct. 3099
(1985) 18

Kolar v. County of Sangamon of
State of Illinois, 756 F.2d 564
(7th Cir. 1985) 12

Maryland v. Baltimore Radio
Show, Inc., 338 U.S. 912,
94 L.Ed.2d 562, 70 S.Ct.
252 (1950) 13

Nix v. Norman, 879 F.2d 429
(8th Cir. 1989) 11

Rice v. Sioux City Memorial
Park Cemetery, Inc., 349 U.S.
70, 99 L.Ed.2d 897, 75 S.Ct.
614 (1955) 13

Wells v. Brown, 891 F.2d 591
(6th Cir. 1989) 11

STATUTES

Connecticut General Statutes
Section 31-51q 2, 17

Page

SUPREME COURT RULES

United States Supreme Court
Rule 10 9

United States Supreme Court
Rule 14.1(a) 20

No. 92-125

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

WALTER SENKOW,

Petitioner

VS.

ROBERT B. WEISS, STEPHEN R. WERBNER
ROBERT LANNAN, GEORGE A. KANDRA
and LORRAINE DUKE,

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

JURISDICTIONAL STATEMENT

The respondents, Robert B. Weiss,

Stephen R. Werbner, Robert Lannan, George

A. Kandra and Lorraine Duke (hereinafter collectively referred to as "defendants") adopt Petitioner Walter Senkow's (hereinafter referred to as "plaintiff") Statement of Jurisdiction.[1]

* * * * * *

STATUTORY PROVISIONS INVOLVED

The defendants adopt the plaintiff's statement that Section 1983 of Title 42 of the United States Code is involved in this case.

The defendants also submit that this case involves Section 51 of Title 31 of the Connecticut General Statutes, specifically, Connecticut General Statutes Section 31-51q, which provides:

---

[1] The Town of Manchester was the first-named defendant in plaintiff's action but has not been listed by plaintiff as a respondent in these proceedings.

> Any employer, including the state and any instrumentality or political subdivision thereof, who subjects any employee to discipline or discharge on account of the exercise by such employee of rights guaranteed by the first amendment to the United States Constitution or Section 3, 4 or 14 of article first of the constitution of the state, provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer, shall be liable to such employee for damages caused by such discipline or discharge, including punitive damages, and for reasonable attorney's fees as part of the costs of any such action for damages. If the court determines that such action for damages was brought without substantial justification, the court may award costs and reasonable attorney's fees to the employer.

* * * * *

PRELIMINARY STATEMENT

In his Petition for Writ of Certiorari, the plaintiff essentially asks this Court to permit him to replead and change the nature of his case. He asks this Court to make new determinations and

to decide matters which were already decided by the District Court and affirmed by the Court of Appeals in accordance with well established law.

The plaintiff's presentation of the issue is misleading and unfounded in light of the pleadings and proceedings in this case. Plaintiff's complaint expressly alleged an official-capacity action only, which action is barred under the Settlement Agreement executed by plaintiff.

The defendants respectfully submit that the plaintiff fails to present a viable appellate issue to this Court and that the Petition for Writ of Certiorari should be denied.

* * * * * *

STATEMENT OF THE CASE

The defendants hereinafter provide this Court with a brief background of this case, setting forth those facts which do

not appear in the plaintiff's Petition.

The undisputed underlying facts, as set forth in the "Ruling on Pending Motions" (Pet. App. 8-10), reveal that on December 22, 1985, photographs depicting a couple engaged in sexual intercourse were left on the desk of a female Town employee, after hours. Five days later, additional similar pictures were left on the same individual's desk, and, on yet another night thereafter, a copy of Judith Rossner's book "Looking for Mr. Goodbar" was left on the same woman's desk. The employee reported this disturbing sequence to the Town police. After investigation by the Town police, the plaintiff, in a signed sworn statement, admitted that he had committed these acts. Plaintiff declined the invitation to resign from his employment and was subsequently discharged from his employment with the Town.

The plaintiff challenged his discharge and thereafter, a settlement agreement was signed by plaintiff and his counsel whereby the plaintiff's employment termination was revoked, he was permitted instead to resign, he received $20,000 in benefits, and in return, he agreed to release and discharge any and all claims as to his employment which may have existed then or in the future. (Pet. App. 29-31). Nearly one year and a half after he executed the settlement release and procured the benefits thereunder, the plaintiff filed the instant lawsuit against the Town and the defendant Town officials.

This case involves the validity and scope of the settlement agreement into which the plaintiff entered after his discharge from employment with the Town of Manchester, Connecticut. Despite plaintiff's contentions below to the

contrary, the United States District Court for the District of Connecticut determined that the release was valid. The District Court also decided that the release barred plaintiff's claims against all of the defendants and granted summary judgment, dismissing the plaintiff's action. Nearly two months after the District Court granted summary judgment, and after the plaintiff had filed a notice of appeal, (App. 1), the plaintiff moved the District Court to reconsider its judgment and to permit the plaintiff to replead against the Town officials in their personal capacities. (App. 2-3). The District Court denied the motion and the denial was not the subject of plaintiff's appeal to the Court of Appeals.

In his Petition to this Court, the plaintiff is no longer challenging the validity of the release. Indeed, the Town

of Manchester is not listed by plaintiff as a respondent. Nor does the plaintiff argue, as he could not, that the District Court abused its discretion in denying the plaintiff's motion permit him to replead. Instead, the plaintiff argues solely that his Amended Complaint, even without the desired amendments, alleged liability against the town officials in their personal capacities. The plaintiff seeks to avoid the consequences of his settlement agreement, which was held valid and enforceable by both the District Court and the Court of Appeals, by making a plea to this Court to permit him to reopen his case and proceed against the defendants in their personal capacities under his Amended Complaint. However, as is demonstrated below, the Amended Complaint, including its caption and substantive

paragraphs, as well as the proceedings before the District Court, clearly reveal that the plaintiff expressly and explicitly sued defendant Town officials only in their official capacities.

* * * * * *

ARGUMENT

I. PLAINTIFF FAILS TO SET FORTH AN APPROPRIATE BASIS SUPPORTING HIS PETITION THAT THIS COURT SHOULD CONSIDER REVIEWING THE MATTER

United States Supreme Court Rule 10 sets forth the categories of reasons justifying consideration of a Petition for Certiorari and provides that certiorari may be granted:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings,

> or sanctioned such a departure by a lower court, as to call for an exercise of the Court's power of supervision.
> (b) When a state court of last resort had decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

As is discussed more fully in Section II below, plaintiff sued the defendants in their capacity only as agents of the Town. Plaintiff has pointed to no other decisions of the Courts of Appeals in which such a lawsuit has been determined to be anything but an official-capacity suit. Nor does plaintiff provide any facts or rationale supporting a potential contention that this case presents an important question of federal law to be addressed by this Court. Contrary to

plaintiff's assertion, the Court of Appeals for the Second Circuit did not require an explicit assertion of a personal-capacity suit in this case. Instead, the Court of Appeals based its determination on plaintiff's explicit assertion of an official-capacity agency claim, without any averment in the Amended Complaint to the contrary. (Pet. App. 5). It is conceded that plaintiff does direct this Court's attention to other decisions in which there might exist a viable basis for the consideration of the grant of certiorari. However, this case is considerably different from those cases cited by plaintiff and indeed does not contain the issue presented therein. The referenced decisions of Wells v. Brown, 891 F.2d 591 (6th Cir. 1989), Nix v. Norman, 879 F.2d 429 (8th Cir. 1989), and

Kolar v. County of Sangamon of State of Illinois, 756 F.2d 564 (7th Cir. 1985) all hold that personal-capacity suits must be specifically pleaded as such. Neither the District Court nor the Court of Appeals, directly or indirectly, so ruled in this case.

Furthermore, plaintiff does not direct this Court to any egregious departure from the accepted and usual course of judicial proceedings.

Plaintiff has failed to meet the threshold requirement of presenting to this Court any viable reason supporting his Petition for Certiorari. As this Court has stated, certiorari is granted only in those cases wherein the decision on a principle of law is of importance to the public or where there are special and important reasons for this Court's

consideration of the issue. Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 917-918, 94 L.Ed.2d 562, 70 S.Ct. 252 (1950); Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74-75, 99 L.Ed.2d 897, 75 S.Ct. 614 (1955). Mr. Senkow presents an issue of interest and importance to him and him alone in light of the procedural history of this case. Mr. Senkow's Petition fails to meet the standards essential for review by this Court.

* * * * *

II. NO BASIS EXISTS TO DISTURB THE DETERMINATION THAT THE PLAINTIFF SUED THE DEFENDANTS IN THEIR OFFICIAL CAPACITIES

A. EVEN UNDER LESS RIGID PLEADING REQUIREMENTS, THE PLAINTIFF DID NOT ALLEGE CLAIMS AGAINST THE DEFENDANTS IN THEIR PERSONAL CAPACITIES

This Court has recently recognized that the Courts of Appeals appear to employ different requirements in determining whether defendants have been sued in their personal capacities. See Hafer v. Melo, 502 U.S. ____, 116 L.Ed.2d 301, 308 n.*, 112 S.Ct. 358, 361 n.* (1991). Some Courts of Appeals apply a rigid pleading requirement in that the plaintiff must specifically plead that a suit for damages is being brought against an official in his or her personal capacity. On the other hand, other courts apply a "less rigid" requirement.

The defendants submit that, even under the "less rigid" requirements whereby the complaint and the proceedings below are reviewed, the plaintiff in this case did not sue the individual defendants in their personal capacities.

In his Petition, the plaintiff admits that his Amended Complaint did not explicitly assert that the defendants were being sued in their personal capacities. Under the "less rigid" cases noted by this Court in Hafer v. Melo, supra, the plaintiff must make an allegation that the defendant personally violated the plaintiff's constitutional rights. See e.g., Houston v. Reich, 932 F.2d 883, 885-86 (10th Cir. 1991) (plaintiff alleged that each defendant police officer beat and assaulted the plaintiff and deprived him of his constitutional rights). In the instant case, nowhere did the plaintiff allege that each or any of the town officials deprived him of his constitutional rights. Instead, the plaintiff very generally alleged that the defendants' (including the Town's) actions deprived the plaintiff of his

constitutional rights. (Pet. App. 24-28). Throughout the Amended Complaint, the plaintiff lumped together the Town and the Town officials in setting forth his general allegations. Furthermore, at the beginning of his Amended Complaint, the plaintiff alleged: "At all relevant times, the individual defendants operated as agents of the town." (Pet. App. 24). The Court of Appeals for the Second Circuit was correct in holding: "Neither in the caption of the Amended Complaint nor in the substantive paragraphs did Senkow allege a claim against any town employee in his individual capacity." (Pet. App. 5).

The plaintiff argues in his Petition that his claim for punitive damages within his Amended Complaint supports his contention of an individual-capacity suit. However, a review of plaintiff's

Amended Complaint reveals that plaintiff sought punitive damages from the Town under Connecticut General Statutes, Section 31-51q. (Pet. App. 28). The Third Count of the Amended Complaint separately sets forth that the Town of Manchester discriminated against the plaintiff in his employment, giving rise to punitive damages against an employer under Connecticut General Statutes Section 31-51q. (Pet. App. 27-28).

It is noteworthy that the other damages which the plaintiff sought under his Amended Complaint could have been recovered only from the Town, which is not even a respondent to plaintiff's Petition. These damages include back pay and reinstatement to employment. (Pet. App. 28).

Even under the "less rigid" approach applied by various circuit courts, the

plaintiff did not set forth personal capacity allegations against the defendants in his Amended Complaint.

Moreover, plaintiff explicitly alleged the defendants were being sued as agents of the Town. As this Court has ruled, official-capacity suits are those in which a party alleges an action against an official as an agent of the employing entity and the lawsuit is regarded as a suit against that entity. Kentucky v. Graham, 473 U.S. 159, 165-166, 87 L.Ed.2d 114, 105 S.Ct. 3099 (1985). By his express and explicit allegation, plaintiff chose to pursue an action against the individual defendants in their official capacity only, and thus a suit against the Town of Manchester, which suit was barred by the Settlement Agreement.

In addition, with respect to the proceedings before the District Court, it

is noteworthy that not until nearly two months after the dismissal of his action did the plaintiff attempt to amend his complaint to allege personal capacity claims.

B. THERE IS NO ISSUE PENDING AS TO THE APPROPRIATENESS OF THE DISTRICT COURT'S DENIAL OF THE MOTION FOR LEAVE TO AMEND

The plaintiff notes in his Petition that the District Court "rebuffed" his attempt to amend his complaint, and that the District Court's action was unreasonable because the dismissal was with prejudice and without any right to plead over. However, the plaintiff has failed to inform this Court that his Complaint had already been once amended, and he also failed to inform this Court that he did not move the District Court to further amend his Amended Complaint until nearly two months after the District Court

granted summary judgment (App. 2-3), dismissing plaintiff's action, and after plaintiff had already appealed the District Court's grant of summary judgment. (App. 1).

Not only was the District Court's action appropriate, but the plaintiff never challenged the District Court's denial of the request for leave to amend. Consequently, plaintiff has not sought, as he cannot, this Court's review thereof. See United States Supreme Court Rule 14.1(a) ("Only the questions set forth in the Petition, or fairly included therein, will be considered by the Court").

* * * * * *

CONCLUSION

Plaintiff's attempt to frame an issue for this Court's review is based on a distorted representation of the pleadings and proceedings below. Plaintiff seeks

from this Court an opportunity to begin his case once again, six years after settling his claims with the defendants, by creating a claim explicitly excluded by him in his unsuccessful lawsuit against these defendants. Accordingly, defendants respectfully submit that plaintiff's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Constance L. Epstein
Howard, Kohn, Sprague &
FitzGerald
237 Buckingham Street
Hartford, Connecticut 06106
(203) 525-3101
Attorney for Respondents

No. 92-125

In The

Supreme Court Of The United States

OCTOBER TERM, 1992

WALTER SENKOW,
Petitioner

v.

ROBERT B. WEISS, STEPHEN R. WERBNER, ROBERT LANNAN, GEORGE A. KANDRA and LORRAINE DUKE,
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

APPENDIX TABLE OF CONTENTS

Page

NOTICE OF APPEAL,
dated August 11, 1989 ..... A-1

MOTION FOR RECONSIDERATION
AND FOR LEAVE TO AMEND
COMPLAINT, dated
October 3, 1989 ..... A-2

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Docket No. H-88-41(AHN)

Walter Senkow

v.

Town of Manchester, et al

NOTICE OF APPEAL

1. Pursuant to Fed. R. App. P. 4(a)(1), Walter Senkow hereby gives notice and appeals to the United States Court of Appeals for the Second Circuit for the following judgment or order (describe the judgment or order): Judgment following cross-motions for summary judgment.

2. The judgment/order in this action was entered on 8/11/89.

Signature_____
Leon M. Rosenblatt
Address: 10 North Main Street
West Hartford, CT 06107

date: August 21, 1989

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

WALTER SENKOW Plaintiff	NO. H-88-41(AHN)
VS.	
TOWN OF MANCHESTER, ET AL Defendants	OCTOBER 3, 1989

MOTION FOR RECONSIDERATION
AND FOR LEAVE TO AMEND COMPLAINT

The plaintiff moves pursuant to rules 54(b) and 60 that the court reconsider its Ruling on Pending Motions, entered on August 11, 1989. The plaintiff moves that the court 1) reconsider its Ruling to correct obvious errors of law; 2) permit the plaintiff to amend his complaint to make clear that Weiss, Werbner, Kandra, Lannan, and Duke were sued in their personal capacities; 3) enter judgment against the Town of Manchester on its counterclaim so that the FRCP 54(b)

ORAL ARGUMENT IS NOT REQUESTED

requirement of finality will be satisfied; and 4) enter judgment against Robert Weiss on Count Two.

This motion was occasioned by a Pre-Argument Conference held pursuant to the Second Circuit's Civil Appeals Management Plan (CAMP) on September 28, 1989. By agreement of the parties, the plaintiff's appeal is being withdrawn without prejudice to re-appeal after the District Court's decision on the instant motion.

A memorandum of law accompanies this motion.

THE PLAINTIFF
By_____
Leon M. Rosenblatt

CERTIFICATION

This is to certify that a copy of the foregoing was mailed, postage prepaid, on October 3, 1989, to Attorney Thomas P. Cella, 41 Center Street, Manchester, CT 06040 and Attorney John R. FitzGerald, Howard, Kohn, Sprague & FitzGerald, 237 Buckingham Street, Hartford, CT 06106.

_____
Leon M. Rosenblatt